Supreme Court, U.S.
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No. 92-1600

In the

Supreme Court of the United States

October Term, 1992

THE PARSONS CORPORATION AND THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

This Court does not have jurisdiction over this matter under 28 U.S.C. § 1257(a) (1988) as no federal question was timely asserted before the state court below.

STATUTORY PROVISIONS INVOLVED

Sec. 43.19.010. COMPACT. The Multistate Tax Compact is hereby enacted into law and entered into with all jurisdictions legally joining in it, in the form substantially as follows:

ARTICLE I. PURPOSES.

The purposes of this compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

. . . .

ARTICLE IV. DIVISION OF INCOME.

1. As used in this Article, unless the context otherwise requires:

. . . .

(i) "This state" means the state in which the relevant tax return is filed . . . .

2. Any taxpayer having income from business activity which is taxable both within and outside this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion net income as provided in this Article . . . .

9. All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

. . . .

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this state regardless of the f.o.b. point or other conditions of the sale . . . .

17. Sales, other than sales of tangible personal property, are in this state if: (a) the income-producing activity is performed in this state; or (b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in

respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

. . . .

ARTICLE IX. ARBITRATION.

. . . .

3. [T]he taxpayer, by written notice to the commission and to each party state . . . , may secure arbitration of an apportionment or allocation, if the taxpayer is dissatisfied with the final administrative determination of the tax agency of the state . . . on the ground that it would subject the taxpayer to double or multiple taxation by two or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

. . . .

ARTICLE XII. CONSTRUCTION AND SEVERABILITY.

This compact shall be liberally construed so as to effectuate the purposes thereof . . . .

STATEMENT OF THE CASE

The Parsons Corporation, with its wholly owned subsidiary the Ralph M. Parsons Company (hereinafter collectively "Parsons"),[1] is a multinational corporation providing design, engineering, procurement, and construction services. Parsons has described itself as the "unrivalled leader in the modularization of production and process facilities for use" on Alaska's North Slope. *State, Dep't of Revenue v. Parsons Corp.*, 843 P.2d 1238, 1243 (Alaska 1992); App. 11a.[2] Parsons contracted with Atlantic Richfield Company and ARCO Oil and Gas Company (hereinafter "ARCO") to design, fabricate, and deliver very large modules, some eight stories in height, to be installed as oil and gas production facilities on Alaska's North Slope. Although there was a series of contracts, covering over a decade, the adjudication process focused on three contracts.

Under all three contracts, Parsons performed work in several states other than Alaska. The modules were assembled in Washington and Oregon, the design work was performed in California, and some of the work took place in Texas. Title to the modules was held by Parsons until the modules were delivered in Alaska. In the first of the contracts, Parsons was described as an independent contractor for ARCO, and specifically not an agent. All

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[1] The state is not using the appellation "Engineer" utilized by Parsons, because that term does not accurately describe Parsons' multiple functions under the contracts that are the subject of this appeal.

[2] All citations to "App." are to Parsons' Appendices to its Petition for Writ of Certiorari.

the contracts were cost-plus-fixed-fee contracts utilizing a zero-balance bank account mechanism.

Alaska, California, Washington, Oregon, and Texas are all members of the Multistate Tax Compact, known prior to 1970 as the Uniform Division of Income for Tax Purposes Act (UDITPA). Under the Compact, a three-part formula is used to apportion income earned by a taxpayer who has business activity in more than one state. Once the income is apportioned among the different states, tax is assessed by the individual states under their own tax schemes. Parsons claims to have paid taxes on some portion of the project in California, but made no claims that taxes were paid in Washington, Oregon, or Texas.

The issue in apportioning Parsons' income among the states is whether Parsons sold tangible personal property or sold only personal services. Under the Multistate Tax Compact, receipts from sales of tangible personal property are attributed to the destination state in calculating the "sales factor" of the three-part formula. Alaska Stat. § 43.19.010 Art. IV, Sec. 16 (1970). Receipts from sales of personal services are attributed to the state in which the services were performed. Alaska Stat. § 43.19.010 Art. IV, Sec. 17 (1970). The practical result of this determination is that Alaska may tax Parsons if the contracts are deemed to be for the sale of tangible personal property. If, however, Parsons is deemed to have provided services only, it will for the most part escape taxation on these valuable contracts.

In filing its Alaska corporate income tax return, Parsons excluded its revenues from the ARCO contracts from its sales factor by treating the transactions as the sale of personal services rather than the sale of tangible personal property. The Alaska Department of Revenue

(hereinafter "Revenue") Income and Excise Audit Division (hereinafter "audit division") attributed the revenues to Alaska as being from the sale of tangible personal property and adjusted the returns for the tax years 1977-81. Parsons requested and received an informal conference with the audit division,[3] pursuant to Alaska Stat. § 43.05.240(a) (1976). Parsons then requested and received a formal administrative hearing pursuant to Alaska Stat. § 43.05.240(b) (1970).

The Commissioner of Revenue appointed a hearing officer as her delegate to hear and determine the appeal. App. 27a. The appeals coordinator for the audit division acted as advocate for that division. App. 27a. After the formal hearing, Revenue affirmed the audit division's assessment of additional taxes, finding that Parsons sold tangible personal property to ARCO. The Revenue hearing officer performed a lengthy analysis of the arguments raised by Parsons. App. 26a-112a.[4] In a

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[3] Parsons repeatedly and incorrectly labels this procedure as an "informal hearing" and labels the audit division participant as an "informal hearing officer." Petition at 4 n.1, 11. A better analogy would be to a settlement conference with an opposing party prior to litigation.

[4] The parties entered into a stipulation of facts that was adopted by Revenue's hearing officer and set out verbatim as her findings of fact. App. 28a. Parsons mischaracterizes some of these stipulated facts in its Petition. For example, Parsons erroneously states the parties stipulated that "OILCO could compel Engineer to transfer any procured materials anywhere, even another state or country, without additional compensation, because the parties regarded the materials as always owned by OILCO." Petition at 3. The underlined portion does not appear in the stipulation. App. 36a, Finding of Fact ("F.F.") 35. Errors also appear in Parsons' version of the stipulations numbered as 1 (F.F. 49), 4 (F.F. 36), and 8 (F.F. 37). Petition at 3.

decision adopted by the Commissioner,[5] the hearing officer applied Alaska law and specifically found that Parsons was not acting as ARCO's agent in performing the contracts at issue; that Parsons' home office engineering services performed outside Alaska were not separate income-producing activities (therefore, its gross receipts from those services should be included in its Alaska sales factor numerator); that the method of apportionment required by Alaska law does not violate the Due Process or Commerce Clauses of the United States Constitution; and that it was not an abuse of discretion to refuse Parsons an adjustment to its Alaska sales factor. App. 110a-111a.

Parsons took an appeal to the state superior court, which acted as an intermediate appellate court. No federal issues were raised in any of the briefing before that court nor in the opinion of that court. The superior court applied its independent judgment to the administrative decision, while finding that Revenue's decision was entitled to some weight. App. 17a. The court found that the contracts were for the sale of services, not tangible personal property. He found Parsons' functions under the contracts were more like those of a construction contractor than those of a manufacturer, wholesaler, or retailer. App. 18a-20a. The court then held Parsons was ARCO's agent in procuring materials under two of the contracts, so the receipts attributable to procuring those materials should not be included in the Alaska sales factor. App. 23a. Finally, the court held the home office engineering services performed under the third contract were a separate income-producing activity not performed in Alaska. App. 24a.

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[5] The commissioner who approved the final decision was the successor to the person who had been in the office at the time the hearing officer was appointed.

Revenue appealed the intermediate appellate court's decision to the Alaska Supreme Court. Neither party asked the Alaska Supreme Court to rule on any federal question. The Alaska Supreme Court did not in fact address any federal question.

The Alaska Supreme Court determined that the reasonable basis test applied in this matter, because the facts were complex and the case "requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision." *State, Dep't of Revenue v. Parsons Corp.*, 843 P.2d 1238, 1241 (Alaska 1992); App. 6a. In reviewing Revenue's decision that Parsons was not ARCO's agent, however, the Alaska Supreme Court used the *independent judgment* standard of review. 843 P.2d at 1242 n.3; App. 8a. The court found that the contracts were for the sale of tangible personal property delivered to Alaska; that Parsons was not ARCO's agent for Alaska income tax purposes; and that it was fair to attribute Parsons' sales to Alaska, since "failure to attribute sales to the state in which they are made 'would greatly under-represent the extent of the taxpayer's activities within the state.'" 843 P.2d at 1243; App. 11a.

SUMMARY OF ARGUMENT

Parsons did not raise a federal question before the state courts of Alaska until it filed its Petition for Rehearing to the Alaska Supreme Court. In that document, the constitutional issues arising from the Commerce and Due Process Clauses of the United States Constitution are addressed cursorily in two short paragraphs. App. 119a, 120a-121a.

Parsons attacks Alaska's highest court as denying it due process in the way the court wrote its opinion. The Alaska Supreme Court applied the appropriate standard of review and properly based its opinion on the record before the administrative agency. The Alaska court adequately explained its decision. Parsons also attacks the adjudicative procedures followed by Revenue. These procedures were not challenged by Parsons until it petitioned for rehearing to the Alaska court. Revenue's procedures protect the full panoply of due process rights provided by federal and state law.

Without any factual record to support its claim, Parsons alleges that it was treated differently as a nonresident corporation. Although Parsons suggests an equal protection issue, there is no actual discussion in the petition of the Equal Protection Clause of the United States Constitution or its application to this matter.

Although the issue was not raised before the state courts, Parsons now argues that the federal Commerce Clause was violated because the Alaska Supreme Court should have interpreted "agency" under California law and not Alaska law. Parsons fails to indicate how the result might have been changed if Alaska applied California law. In its Petition for Rehearing to the Alaska Supreme Court, Parsons first mentioned the Commerce Clause in the context of a theoretical risk of multiple taxation. Parsons failed to acknowledge the arbitration process built into the Multistate Tax Compact to prevent duplicate taxation by the states.

Under the approach advocated by Parsons, every disgruntled losing party before a state's highest court can invoke the jurisdiction of this Court by simply attacking the opinion written by the state court as unconstitutional.

Under 28 U.S.C. § 1257 (1988), and the rules and decisions of this Court, "federal question" jurisdiction is not lightly invoked. Parsons has demonstrated no special and important reason for review on writ of certiorari as required by Sup. Ct. R. 10.1.

ARGUMENT

1) Parsons did not "specially set up or claim" a federal issue before the state court.

Under 28 U.S.C. § 1257, Parsons' claim of a federal question must have been "specially set up or claimed" before the Alaska Supreme Court. Sup. Ct. R. 14(h) requires that a petition for writ of certiorari

> specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

This Court reviews the opinion of the state's supreme court to see if any federal question is mentioned:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Webb v. Webb, 451 U.S. 493, 495 (1981) (citations omitted); *accord Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987); *Board of Directors v. Rotary Club*, 481 U.S. 537, 550 (1987); *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

This Court noted in *Webb* that there are "powerful policy considerations" underlying its consistent refusal to decide constitutional issues which are raised for the first time in this Court on review of the state court decision:

> Principals of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. . . .
>
> . . . .
>
> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first

> instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

451 U.S. at 499-501.

Parsons admits it first raised a "federal question" to the Alaska Supreme Court in its Petition for Rehearing (App. 113a) filed with the Alaska Supreme Court. Petition at 12. In the course of the administrative adjudication before the hearing officer, Parsons alleged a violation of the Due Process and Commerce Clauses of the United States Constitution. App. 100a-108a. The hearing officer discussed those issues at length and found no constitutional violation. *Id.* Parsons abandoned the constitutional issues in its appeal to the superior court acting as an intermediate appellate court; in Parsons' opening and reply briefs, no federal code or constitutional provisions are cited. The only federal cases mentioned were cited on the common law of agency, not on any federal question. Legal issues not argued in an appellant's opening brief to the superior court are deemed waived, and may not be raised in a subsequent proceeding before the Alaska Supreme Court. *Peterson v. Mutual Life Ins. Co.*, 803 P.2d 406, 410 n.8 (Alaska 1990); *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211, 213 n.4 (Alaska 1982).

In its opposition brief filed with the Alaska Supreme Court, Parsons made no attempt to revive its federal claims. Its brief contains no citations to federal code or constitutional provisions. The only federal case cited on a federal issue was *Continental Baking Co. v. Woodring*,

286 U.S. 352 (1932), which was cited for the general proposition that legislatures have broad discretion when engaged in line-drawing.

As justification for its conceded failure to timely set up or claim federal issues, Parsons asserts it was "surprised" by the Alaska Supreme Court's use of the reasonable basis standard of review. Petition at 12. In fact, the Alaska Supreme Court used the *independent judgment* standard of review on the issue of agency, the only issue Parsons targets in this appeal. 843 P.2d at 1242 n.3; App. 8a. Parsons and Revenue discussed both the reasonable basis and independent judgment standards of review in their briefs filed with the Alaska Supreme Court. Parsons made a spirited and lengthy argument that the legal issues presented were not within the special expertise of Revenue, so the reasonable basis standard of review should not apply. Parsons cannot credibly claim it was "surprised" by the application of a well-established standard of review which it acknowledged in its briefing before the state court.

2) The manner in which a state's highest court decides a state issue that involves no federal question does not create grounds for review by this Court.

When a state supreme court is deciding a state issue that involves no federal question, that decision is not subject to review by this Court regardless of any faults in articulation or reasoning by the state court.[6] *See, e.g.*,

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[6] This case involves the interpretation of a tax compact enacted into law by each of the member states. There was no "fabrication of state grounds" by the Alaska Supreme Court to avoid a federal question. (continued...)

Schad v. Arizona, ___ U.S. ___, ___, 111 S. Ct. 2491, 2499 (1991). If Parsons' argument for review is accepted, any state court decision would be subject to review, because the disgruntled losing party could always assert that the state court's rationale for rejecting its position constitutes a denial of due process.

At no point during the adjudication process were Parsons' due process rights violated. This Court has held

> it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Patterson v. New York, 432 U.S. 197, 201-02 (1977) (citations omitted).

a) The adjudicative process before Alaska's courts did not violate due process.

1. Direct review of Revenue's decision

Parsons argues that the decision of the superior court, which acted as an intermediate appellate court, should have received deference. The Alaska Supreme Court, however, gives no deference to the decision of the superior court acting as an intermediate appellate court,

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[6](...continued)
Petition at 15-16. Parsons is inviting review of *state* law, as shown by Question Presented No. 2. Petition at i.

but rather reviews the agency decision directly.[7] *Public Safety Employees Ass'n v. State*, 799 P.2d 315, 318 n.3 (Alaska 1990).

2. Standard of review

The Alaska Supreme Court has long-established standards of review for administrative appeals, which are basically those followed by every state and federal court. *See, e.g.*, 5 Kenneth C. Davis, *Administrative Law Treatise* §§ 29.1 and 29.9 (2d ed. 1984). Questions of law involving the special expertise of the administrative agency are reviewed under the rational basis test. The court substitutes its judgment for that of the agency when the issue presented is a question of law not involving agency expertise. *E.g., Earth Resources Co. v. State, Dep't of Revenue*, 665 P.2d 960, 964 (Alaska 1983). Tax cases have not been singled out by the Alaska court for different treatment.[8] Once the "law" is determined, the

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[7] This practice is not unique to Alaska. *See, e.g., State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 420 (Minn. 1993); *Devous v. State*, 845 P.2d 408, 414 (Wyo. 1993); *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. Super. 1992); *Palesky v. Town of Topsham*, 614 A.2d 1307, 1309 (Me. 1992); *GTE North Inc. v. Public Service Comm'n*, 486 N.W.2d 554, 557 (Wis. Ct. App. 1992); *Dovel v. Dobson*, 831 P.2d 527, 529 (Idaho 1992); *Cowling v. Board of Oil, Gas and Mining*, 830 P.2d 220, 223 (Utah 1991); *Snohomish County v. Hinds*, 810 P.2d 84, 85 (Wash. Ct. App. 1991); *Speedway, Inc. v. Job Serv. North Dakota*, 454 N.W.2d 526, 527 (N.D. 1990).

[8] *See, e.g., Handley v. State*, 838 P.2d 1231, 1233 (Alaska 1992) (Permanent Fund Dividend Division); *Pioneer Construction v. Conlon*, 780 P.2d 995 (Alaska 1989) (Alaska Workers' Compensation Board); *Tesoro Alaska Petroleum v. Kenai Pipeline*, 746 P.2d 896, 903 (Alaska 1987) (Alaska Public Utilities Commission); *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986) (Department of Community and Regional Affairs); *Weaver Bros.*,

(continued...)

application of the law to the facts is committed to the sound discretion of the agency. The scope of review is limited to whether the decision was arbitrary, unreasonable, or an abuse of discretion. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982).

Parsons repeatedly and erroneously states that decisions which are "clearly wrong" cannot be overturned under a reasonable basis standard of review. Petition at 11, 12. As previously noted, the *independent judgment* standard of review was used on the only issue Parsons targets. Even if the reasonable basis standard of review had been followed, however, the court could have reversed the administrative decision as having no reasonable basis if it found that the decision was clearly wrong. Parsons ignores the reality that reasonable persons can often differ and that there is rarely an objective "right" or "wrong." The reasonable basis standard of review, as well as the independent judgment standard of review utilized by the Alaska Supreme Court on the agency issue, comport with federal due process requirements.

3. Fair treatment of tax appeals

Parsons asserts that the Alaska Supreme Court has upheld Revenue in "every corporate income tax appeal." Petition at 11. Parsons has compiled a list of published opinions, of which less than one-fourth involve corporate

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[8](...continued)
Inc. v. Alaska Transp. Comm'n, 588 P.2d 819, 821 (Alaska 1978); *North Slope Borough v. LeResche*, 581 P.2d 1112, 1115 (Alaska 1978) (Department of Natural Resources).

income tax appeals.[9] Parsons' list is not limited to administrative appeals; two of the corporate income tax cases listed were appeals from original actions.[10] If Parsons' list is intended as an exhaustive list of all cases in which Revenue was a party, there are many more cases (administrative appeals and appeals from original complaints, as well as unpublished decisions) that are not included. It is not true that Revenue "never loses" in tax

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[9] Of the cases listed by Parsons in its Appendix at 130a-133a, the following do not involve corporate income taxes:

Liquor control: Boehl v. Sabre Jet Room, Inc.

Gambling: Malone v. Anchorage Amateur Radio Club; State v. A.L.I.V.E. Voluntary

Child support: Smith v. State

Permanent fund dividend program: Handley v. State; State v. Anthony; Morgan v. State; State v. Gazaway; Williams v. Zobel

State Budget Act: Fairbanks North Star Borough v. State; State v. Fairbanks North Star Borough

Mortgage earthquake adjustment plan: Suber v. Alaska State Bond Comm.

Attorney fees: Atlantic Richfield Co. v. State

Oil product taxes: Arco Alaska, Inc. v. State; Union Oil Co. v. State

Individual income taxes: Stephens v. State; Cogan v. State; State v. Oliver; Sjong v. State; Stevenson v. Burgess; State v. Gibson; State v. Baxter; Hickel v. Stevenson

Business license tax: National Bank of Alaska v. State; Alyeska Pipeline Service Co. v. Williams; Williams v. BP Alaska Exploration, Inc.; State v. Alaska Pulp America, Inc.; Green Constr. Co. v. State; State v. Northern TV, Inc.; State v. Sears, Roebuck and Co.; National Bank of Alaska v. State; Northern Adjusters, Inc. v. State; State v. Debenham Elec. Supply Co.

[10] Standard Alaska Production Co. v. State; Fedpac Int'l, Inc. v. State.

collection cases before the Alaska Supreme Court.[11] Petition at 11.

Obviously, any review of the Alaska Supreme Court's tax opinions to determine whether the court was objectively fair to the taxpayer would necessitate a review of all the administrative records presented to the court, which are not part of the record in this case. A statistical study of "success rate" means nothing. The Department of Revenue as a party in litigation can exercise a great deal of control over which matters reach the Alaska Supreme Court. By choosing not to appeal adverse intermediate appellate decisions and by settling cases appealed by taxpayers, the state effectively weeds out weaker cases.

Parsons further suggests that Revenue has a "predilection for bias" against nonresident corporations. Question Presented No. 1, Petition at i. This issue is raised *de novo* with this Court. There is no record suggesting that Revenue has discriminatorily assessed taxes on nonresident corporations or has discriminated in considering favorable adjustments for nonresident corporations at Revenue's informal conferences and formal

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[11] An exhaustive search has not been performed, however, a few examples may be noted. In an unpublished decision, *F.W. Woolworth Co. v. State*, No. 101 (Alaska filed Oct. 29, 1981), the Alaska Supreme Court struck down Revenue's corporate income tax assessment. In *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534 (Alaska 1978), the Alaska Supreme Court invalidated a regulation promulgated by Revenue that denied a tax credit for payment of municipal property taxes on oil and gas production and pipeline property above certain limits. In *State v. Wakefield Fisheries, Inc.*, 495 P.2d 166 (Alaska 1972), *overruled in part by Principal Mutual Life Ins. v. State, Div. of Ins.*, 780 P.2d 1023, 1030-31 (Alaska 1989), the court overturned Revenue's decision on commercial fishing taxes.

hearings. Parsons also suggests discrimination by the Alaska Supreme Court against nonresident corporations. Petition at 15, 16, 20, 22. Again, no evidence is cited to support such an allegation. Even among the Alaska Supreme Court cases listed by Parsons at 130a-133a of its Appendix, no differential treatment can be found between resident and nonresident corporations.

b) The Alaska Supreme Court did not violate Parsons' due process rights in deciding the agency issue.

Parsons argues the Alaska Supreme Court erred in applying Alaska agency law instead of California law in determining Parsons' state tax liability. This is a question of common law, *not* a federal question. Furthermore, Parsons fails in its petition to cite the California law, to state the differences between California and Alaska agency law, and to describe how the application of California law would have changed the result in this case. In short, Parsons has stated no reason why the Alaska court's use of Alaska law should be considered a violation of its constitutional rights. It is not sufficient for a party merely to propose that a state supreme court violated its due process rights by not ruling in the party's favor.

Parsons relies on language in the Alaska Supreme Court opinion that Parsons provided agency procurement services. Petition at 6 n.3, 12. It is not inconsistent with the provisions and purposes of the Multistate Tax Compact for a party to be, in part, a purchasing agent for another contracting party, yet perform other functions which result in a finding that a sale of tangible personal property occurred. The Alaska Supreme Court listed "agency procurement services" as merely one of a number of activities performed by Parsons under the contracts.

843 P.2d at 1239-40; App. 2a-4a. In addition to the procurement services, the Alaska court noted Parsons engineered, designed, fabricated, delivered, and installed the modules under each contract. 843 P.2d at 1240; App. 3a. The court therefore found that, even if Parsons performed in one respect as an agent, the overriding purpose of the contracts was the sale of tangible personal property.

Parsons' entire petition is based on the mistaken assumption that the outcome of their tax case depends on whether they were ARCO's agent. The actual question, as described above, is whether the Parsons/ARCO contracts were contracts for the sale of services, or contracts for the sale of tangible personal property. Nowhere does the Multistate Tax Compact mention "agency" as a controlling concept, nor do any California or Alaska cases suggest that a finding of an agency relationship ends the inquiry. The Compact is intended to be interpreted liberally to recognize the extent of a taxpayer's activity in a state. Alaska Stat. § 43.19.010 Art. IV, Sec. 18, and Art. XII (1970). Parsons' suggestion that it may escape taxation by contract is simply untrue -- a contract between two parties cannot bind a noncontracting third party. 17 Am. Jur. 2d *Contracts* §§ 294, 297 (1964). Parsons' argument that the Alaska Supreme Court burdened the terms of its contract (Petition at 20) is similarly invalid. Even if Alaska had improperly imposed duplicate taxation on Parsons, the Compact provides a method for resolving such a dispute. Alaska Statute § 43.19.010 Art. IX. The contract between Parsons and ARCO would not be affected in any way.

Parsons argues the Alaska Supreme Court ignored the facts in holding that Parsons "should not be considered ARCO's agent *for Alaska income tax purposes*." Petition at 11; 843 P.2d at 1242 n.3; App. 8a (emphasis added).

Revenue's hearing officer wrote a lengthy analysis of the agency issue, including citations to the stipulated facts that she had adopted verbatim as findings of fact. App. 62a-89a. The Alaska Supreme Court specifically stated "after reviewing the record, and using our independent judgment, we agree with [Revenue]'s decision on this issue." 843 P.2d at 1242 n.3; App. 8a. Its ruling against Parsons on the agency issue was based on and was fully supported by the record, and was adequately explained in its decision. This Court has stated it will "accord respectful consideration and great weight to the views of the State's highest court." *General Motors Corp. v. Romein*, ___ U.S. ___, ___, 112 S. Ct. 1105, 1110 (1992) (citation omitted).

3) Revenue's adjudicative procedures afford due process.

Revenue, like most state and federal agencies, has multiple responsibilities: investigation, advocacy in disputed cases, and adjudication. 3 Kenneth C. Davis, *Administrative Law Treatise* §§ 18.1 and 18.4 (2d ed. 1984). The investigation and advocacy roles are performed by individuals in the audit division. App. 27a. The adjudicative role is performed by an impartial hearing officer appointed by the Commissioner, who makes a recommendation to the Commissioner. Alaska Admin. Code tit. 15, § 05.030 (Oct. 1981) The hearing officers are employed within the Commissioner's office and are not part of the assessment or collection units or within their chains of authority. Procedures are in place to prevent *ex parte* contacts with the hearing officer and to protect against partiality.[12] *Id.* The Commissioner does

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[12] Parsons repeatedly mischaracterizes the roles of the participants at (continued...)

not have a role in the investigation and advocacy of any particular case; the Commissioner only oversees the audit division along with all other Revenue divisions and functions.[13] The Commissioner makes the final decision after reviewing the recommendation of the hearing officer. *Id.* In *Earth Resources Co. v. State, Dep't of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983), due process questions about the review by the Commissioner of the hearing officer's decision were addressed by the Alaska Supreme Court. The Alaska court held that under both the state and federal constitutions, the "combination of investigatory and adjudicatory functions under one agency head is constitutionally permissible." *Id.*; *accord Marathon*

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[12](...continued)
the formal hearing. Petition at 4 n.1, 11. The audit division advocate happened to be an attorney, but was not employed in that capacity by Revenue. There was no "informal hearing" at which the audit division advocate presided, but there was an informal conference with the audit division advocate. The Hearing Officer at the formal hearing did not "represent" Revenue, as that term is used in a legal context. The Hearing Officer presided at the hearing and the audit division advocate represented the audit division's position.

[13] Parsons states "[t]he DOR Commissioner's principal [sic] statutory responsibilities are to collect taxes." Petition at 12. In fact, the Commissioner has many statutory responsibilities. In addition to overseeing the collection of corporate income taxes, the Commissioner oversees all the functions of Revenue including child support enforcement (Alaska Stat. § 25.27.010); permanent fund dividend payments (Alaska Stat. §§ 43.23.010-.095); liquor control (Alaska Stat. § 44.25.020); games of skill and chance, prior to July 1989 and again at the present (Alaska Stat. § 05.15.010); and collection of estate taxes, motor fuel taxes, tobacco taxes, oil and gas taxes of various types, liquor excise taxes, fisheries taxes, and business license taxes (Alaska Stat. §§ 43.05.010-43.99.950). The Commissioner also participates in managing a variety of funds and sits on various boards and commissions. (Alaska Stat. §§ 14.25.180, 14.40.805, 18.56.020, 23.35.060, 37.14.520, 37.15.110, 44.25.020, 44.82.020, 44.85.005, and 44.88.030).

Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1265 (9th Cir. 1977).

This Court has recognized that multiple functions may be performed by an agency, and even by the same person. *See, e.g., Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976); *Withrow v. Larkin*, 421 U.S. 35, 49-52 (1975); *Richardson v. Perales*, 402 U.S. 389, 410 (1971). In determining whether a due process violation exists, this Court has evaluated the actual roles performed by the individuals involved. In *Withrow*, this Court found that the combination of the investigative and adjudicative functions in the same persons, without more, does not constitute a due process violation. 421 U.S. at 57-58. There is "a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. This Court is willing to determine if there is an actual problem when findings of actual improprieties are made by judges "with special insights into local realities." 421 U.S. at 58. No such finding has been made by any court with knowledge of Revenue's adjudication process. No one individual in Revenue served as both investigator and adjudicator in this matter.

Similarly, neither the hearing officer nor the commissioner acted as "prosecutor" in this matter. That role was separately performed by an individual from the audit division. In a case cited by Parsons, *Huber Pontiac, Inc. v. Allphin*, 431 F. Supp. 1168 (S.D. Ill. 1977), *vacated on other grounds sub nom. Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817 (7th Cir. 1978), a hearing officer improperly performed both the roles of adjudicator and prosecutor. That hearing officer made objections to the questions of plaintiff's counsel, ruled on objections, offered and received exhibits, engaged in *ex parte* contact

with witnesses, and wrote recommendations for the director's decision. Parsons describes the procedure in *Huber* to be "less biased" than Revenue's procedures. Petition at 14. Yet, Parsons had so little concern about Revenue's procedures that it failed to raise any question about those procedures until its Petition for Rehearing to the Alaska Supreme Court. In that document, without any citation of authority, Parsons argued that it was denied due process because the Department as a whole is the advocate as well as the adjudicator, and that the Commissioner rather than an independent authority approves the hearing officer's decision. App. 120a-121a. No allegation has been made that the hearing officer or the Commissioner acted improperly in the conduct of the administrative hearing or performed prosecutorial functions in this matter.

The federal Administrative Procedures Act, 5 U.S.C. § 554(d) (1966), provides that no employee engaged in investigating or prosecuting may, in that case or a factually related case, also participate or advise in the adjudicating function. Specifically exempted from the prohibition are "the agency or member or members of the body comprising the agency." Revenue's procedures fully comply with those required of federal agencies.

Revenue's adjudicative procedures also comport with the dictates of federal due process. Parsons had an opportunity to raise any particular concerns in the Alaska courts and failed to do so. This Court should decline to review this issue.

4) Alaska's application of the Multistate Tax Compact did not violate the Commerce Clause of the United States Constitution.

Parsons concedes that the Multistate Tax Compact satisfies the Commerce and Due Process Clauses of the United States Constitution. Petition at 3. It is Parsons' position that Alaska's *interpretation* of the Compact violates the Commerce Clause. This position was asserted for the first time in its Petition for Rehearing to the Alaska Supreme Court. The only discussion in the petition about the Commerce Clause is the following:

> Parsons has been . . . subjected to an unreasonable burden in respect to interstate commerce under U.S. Constitution, Art. I, section 8, Clause 3, due to the absence of articulated analysis. This opinion will be not [*sic*] persuasive to other courts and subject [*sic*] Parsons to multiple taxation.

App. 119a. Nowhere in its Petition for Rehearing before the Alaska Supreme Court, or at any other time in the state courts, did Parsons assert the argument it now makes in its Petition for Writ of Certiorari that the Alaska Supreme Court's choice of law violates the Commerce Clause.

In its Petition for Rehearing to the Alaska Supreme Court, Parsons was apparently arguing that it risks multiple taxation if other states do not accept the designation of its income as being from the sale of tangible personal property. Parsons presumably knew before the administrative record was closed in December 1987 whether it would be subjected to multiple taxation for the tax years 1977 - 1981. Parsons had the opportunity and responsibility during the administrative hearing to prove actual multiple taxation. Parsons had the burden of proof

that it was doubly taxed. *Scott V. Williams, Inc. v. Board of Taxation*, 372 A.2d 1305, 1310 (N.H. 1977).

One of the primary functions of the Multistate Tax Compact is to avoid duplicate taxation. Alaska Stat. § 43.19.010 Art. I, Sec. 1 (1970). The Compact allows for binding arbitration by taxpayers of apportionment and allocation disputes, when a state's final administrative determination would subject the taxpayer to multiple taxation by two or more party states. Alaska Stat. § 43.19.010 Art. IX, Sec. 3 (1970).

The Alaska court's decision under the Compact did not violate the Commerce Clause. This Court has held that the Commerce Clause "requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967) (citation omitted). There is a clear nexus between Alaska and the contracts at issue here.

The member states of the Multistate Tax Compact have given recognition to the importance of the market created by the destination state by allocating income from the sale of tangible personal property to that state. Alaska Stat. § 43.19.010 Art. I and Art. IV, Sec. 16(a) (1970). Alaska was the destination state for the modules that were installed as oil and gas production facilities on Alaska's North Slope. It is unreasonable for Parsons to suggest that Alaska had no more interest in the subject contracts than Kansas had in the claims at issue in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Petition at 17-18. There was far more than the "minimum connection" required by *National Bellas Hess* between

Alaska and the subject contracts, and Alaska's imposition of tax on these transactions was certainly foreseeable.[14]

In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), *reh'g denied*, 439 U.S. 885 (1978), this Court reviewed an Illinois-based taxpayer's assertion that Iowa's single-factor sales formula subjected it to taxation on a greater portion of its income than was reasonably attributable to Iowa. The taxpayer alleged violations of the Due Process and Commerce Clauses. The Court found no such violations, in accordance with the

> basic principles that the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by "clear and cogent evidence" that the income attributed to the State is in fact "out of all proportion to the business transacted . . . in that State," or has "led to a grossly distorted result."

Id. at 274 (citations omitted). The Court found that, if the Illinois taxpayer were subject to duplicative taxation (although the record in that case, as here, was devoid of evidence on the subject), it would be inappropriate to assume the fault lay with Iowa's assessment. *Id.* at 276-77. The assumption that the Commerce Clause prohibits any overlap in the computation of taxable income by the States was specifically rejected. *Id.* at 278.

In this case, as in *Moorman*, it would be inappropriate to assume that any risk of duplicative taxation is the fault

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[14] In fact, Parsons' home state, California, made a similar determination regarding the application of the sales factor to a contract for the sale of large steam generating systems. *In re Babcock and Wilcox Co.*, 1978 WL 3915 (Cal. St. Bd. Eq., Jan. 11, 1978).

of Alaska's application of its tax laws. While Parsons has never offered any evidence (or even any argument) that it was doubly taxed on these transactions, it seeks invalidation of Alaska's assessment based on a *theoretical risk* of multiple taxation. The Commerce Clause does not require such a drastic result. Rather, the nexus between Alaska and the subject transactions should be found sufficient to support the assessments at issue. The rules regarding the necessary connection between the taxing state and the transactions at issue are clear; there is no "urgent need for clarification" as suggested by Parsons. Petition at 21.

CONCLUSION

The State of Alaska respectfully requests this Court deny Parsons' petition for writ of certiorari for failure to raise a federal question.

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